Crop Insurance Professionals Association
William V. "Bill" Hanson, Chairman
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June 18, 2007

Mr. Michael F. Hand
Deputy Administrator for Compliance
Risk Management Agency
U.S. Department of Agriculture
1400 Independence Avenue, SW
Stop 0806
Washington, DC 20250-0806

In Re: Proposed Rule to Amend 7 C.F.R. Part 400, Subpart R, Administrative Remedies for Non-Compliance.

Dear Mr. Hand:

In behalf of the Crop Insurance Professionals Association (CIPA), I am pleased to submit comment relative to the proposed rule to amend 7 C.F.R., Part 400, Subpart R, Administrative Remedies for Non-Compliance, published on May 18, 2007 in the Federal Register.

CIPA is strongly committed to combating any fraud, waste, or abuse wherever it may exist in the Federal Crop Insurance Program. However, we are deeply concerned that the proposed rule gives rise to very serious constitutional issues that implicate the rights of all persons who would be impacted by the proposed rule, whether agents, farmers, loss adjustors, or approved insurance providers.

Especially troubling to CIPA is the question of how "willful and intentional acts" is to be proven, particularly given the minimal level of proof required, a mere "preponderance of the evidence" (Sections 400.452 and 400.454(a)(3)). As "willful and intentional acts" and "preponderance of the evidence" are currently defined, we fear it is possible if not quite probable that the actual application of the proposed rule could result in the mere existence of a false or inaccurate statement or noncompliant act or omission constituting prima facie evidence that would effectively shift the burden of proof to the person accused, particularly in an instance where the mere existence of such statement or act or omission is the only available evidence. Given the potentially ruinous pecuniary penalties and the loss of livelihood through disbarment (to say nothing of the permanent loss of reputation in the community) that would result from the finding of a violation, a clear and convincing burden and standard of proof is absolutely vital, if not constitutionally required. After all, it is a well established principle of law that fraud is

not presumed and that, when fraud is alleged, each element must be established by clear and convincing evidence. The party alleging fraud bears the burden of proving it.

Furthermore, CIPA believes a clear indication of how intent will be established with respect to demonstrating whether a statement or act or omission is "willful and intentional" is absolutely crucial. The proposed rule expressly indicates that malice is not required. However, the proposed rule should also expressly indicate, for example, that much more than negligence is certainly required. While it appears that the proposed definition of "willful and intentional" rightly intends that mere negligence is insufficient in law, the difficulty is how this manifests itself in practice since the determination would hinge on intent and how that intent is ultimately divined. The proposed rule should make the matter abundantly clear that the existence of a false or inaccurate statement or a noncompliant act or omission alone does not rise to "willful and intentional" but that additional evidence that clearly establishes scienter is necessary.

CIPA further believes that the proposed rule must be confined to material misrepresentations or omissions. In fact, the conference report to H.R. 2559, the Agricultural Risk Protection Act, "Provides sanctions for *material* violations relative to providing false information and compliance failure." (emphasis added). The legal language in the Act similarly requires materiality. Financial damage should also be required, and any alleged false statement or noncompliant act or omission should be proved to have caused such damages (Section 400.454(a)(4)).

Again, the general legal principle is that to establish even a prima facie claim of fraud, the party alleging it must prove by clear and convincing evidence that there was a false representation or concealment of a material fact; that such representation or concealment was reasonably calculated to deceive; that such representation or concealment was made with the intent to deceive; and that such representation or concealment resulted in injury. CIPA sees no reason to blaze new trails in the area federal case law pertaining to fraud.

But let me be clear. Neither CIPA nor any of its agent members condone the making of a false statement or the engaging in a noncompliant act or omission under any circumstance, whether in the carrying out of the Federal Crop Insurance Act or in the conduct of any other personal or professional matter. But the Federal Crop Insurance Corporation should also appreciate from its own experiences that the Federal Crop Insurance Program is an incredibly information-intensive program rivaled by few other programs. So the notion that any single piece of information out of the thousands of pieces CIPA members process each and every day could, if accidentally misrecorded, somehow still give rise to an accusation and ultimately a sanction that could wipe us out financially, deprive us of our livelihood, and ruin our reputations is, to say the least, extremely alarming. Given this enormous legal, financial, and reputational exposure, CIPA strongly believes it is reasonable and appropriate to limit the universe of actionable items under this proposed rule to material misrepresentations or omissions that cause financial loss. As noted above, this is consistent with the ordinary legal principles pertaining to fraud.

CIPA further believes that the cumulative penalties under the proposed rule underscore how critically important it is that actionable items be confined to material misrepresentations or omissions that cause financial loss (Sections 400.451(c) and 400.454(h). The imposition of cumulative penalties relative to immaterial issues not involving damages almost by definition suggests that the sanctions or penalties to be imposed are excessive as compared to the gravity of the violation in question, once again crossing that line of what may and may not be constitutionally permissible. Frankly, the reduced burden of proof under the proposed rule, the concomitant issues of what exactly constitutes "willful and intentional" and how intent is determined, along with the absence of any materiality or damage requirements makes the addition of cumulative penalties to this proposed rule absolutely breathtaking.

Frankly, however, given what a covered person under the proposed rule could potentially face in cumulative penalties, even if all these other issues – materiality, damages, burden of proof, etc. – are each addressed as discussed above, CIPA is not convinced that a constitutional line may still not be crossed because cumulative penalties could still far outstrip the gravity of even the violations we all agree should be punished. Therefore, CIPA urges that the Federal Crop Insurance Corporation establish appropriate penalties for violations that are always commensurate to the gravity of such violations. Again, the conference report to H.R. 2559 states that the applicable provision "[r]equires the Secretary to consider the gravity of the violation in determining whether to impose a sanction and the amount or degree of any sanction imposed." Of at least some interest to the Federal Crop Insurance Corporation may be the fact that no where in the legislative history, much less the legal language, of the sanction provision of the Agricultural Risk Protection Act is it expressly or implicitly stated that such sanctions should be in addition to other sanctions levied.

It also appears from both the explanation and the proposed rule itself that, in the instance of multiple violations and certain other cases, the maximum penalties relative to disbarment and fines shall apply, notwithstanding any constitutional requirement that the penalty fit the violation (Section 400.454(c)(2)). Worse, as the proposed rule is written, this maximum penalty for disbarment and fines would appear to apply in the case of multiple violations notwithstanding a total lack of materiality or damages. In the Federal Crop Insurance Program, one error (immaterial or not) which does not even arise to negligence much less fraud, can be mistakenly repeated numerous times. The Federal Crop Insurance Corporation needs to seriously reexamine this position.

Further compounding these serious concerns is the imputation of liability to other persons under the proposed rule (Section 400.454(d). Most disturbing is that, as written, the proposed rule appears to hold such persons responsible for the false statements or noncompliant acts or omissions of others even where such statements, acts, or omissions are not fraudulent. In other words, other persons could be held to a higher standard than the person making the statement or committing the act or omission. Furthermore, in some instances, no actual knowledge of a false statement or noncompliant act or omission is even required of the person to whom liability is to be imputed. Obviously, if there is to

be any imputation of liability under the proposed rule, it must pertain strictly to fraudulent statements, acts, or omissions and require actual knowledge or a reason to know.

CIPA also highly questions the constitutionality or, in any case, the legality of the retroactive application of the proposed rule and urges that the Federal Crop Insurance Corporation effectuate any rule to apply prospectively (Section 400.451(d)).

The proposed rule also provides that an approved insurance provider assign the book of an agent or agency found in violation during the period of disqualification or ineligibility (Section 400.454(g)(2)(ii)). Even if all the other concerns above are addressed to conform to generally accepted constitutional and legal principles and a person or entity is rightfully found in violation, this aspect of the proposed rule opens yet another constitutional can of worms, that of an illegal takings. At best, the proposed rule appears to suggest that an agent rightfully found in violation can have his entire business effectively confiscated, in addition to disbarment and other pecuniary fines. At worst, if the other defects of the proposed rule are not cured, an immaterial statement, act, or omission of one person (fraudulent or not) that causes no damages can result in the confiscation of an employing agency's entire book of business notwithstanding the fact that the employing agency had neither actual knowledge or reason to know of such statement, act, or omission.

CIPA also believes that any revisions made to the proposed rule should clear up any and all other ambiguities in the proposed rule so agents, farmers, loss adjustors, approved insurance providers, and any other covered persons have complete and clear notice of our legal responsibilities under the regulation. This, too, is necessary to avoid the serious due process concerns raised under the proposed rule due to the uncertainties that it now presents.

Furthermore, the requirement that covered persons periodically review the ITS and EPLS to determine those persons who are disqualified for participation in the Federal Crop Insurance Program and the consequent imposition of the penalties under the proposed rule (i.e., disbarment) should a person, through simple error or even negligence, do business with such persons directly contravenes the statutory requirement that the relevant sanctions under the proposed rule be confined to "willful and intentional" acts.

On substance, one final point. CIPA strongly believes that – even if all of these defects are cured – the decision to initiate such a serious action under the proposed rule against a farmer, agent, loss adjustor, approved insurance provider, or any other covered person should not rest solely with the Manager of the Federal Crop Insurance Corporation. Rather, such a grave decision must ultimately be determined by the Board of Directors of the Federal Crop Insurance Corporation. The sanctions under the proposed rule are not criminal charges, but the consequences are potentially no less dire or life-altering and, therefore, merit the serious consideration and ultimate judgment of the full Board before being pursued.

Lastly, given the gravity of the proposed rule, CIPA would urge the Federal Crop Insurance Corporation to extend the deadline for comment to August 31 in order for other covered persons, particularly farmers, to comment. For most farmers, the Federal Crop Insurance Program provides vitally important risk management tools that both they and their lenders depend upon. CIPA feels strongly that the people this program is designed for need to fully understand the legal exposure they could face under the proposed rule with each and every piece of information that they provide. Further elevating this point is that the proposed rule would preclude farmers from participating in any and all programs offered by the U.S. Department of Agriculture in the event of a violation.

Thank you for this opportunity to provide comment.

Sincerely,

Bill Hanson

William V. "Bill" Hanson
Chairman
Crop Insurance Professionals Association